

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Federal-State Joint Board on) CC Docket No. 96-45
Universal Service)
)

**REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.
AND NEXTEL PARTNERS, INC.**

Nextel Communications, Inc. and Nextel Partners, Inc. (collectively “Nextel”), by its attorneys, hereby submits reply comments to the Federal Communications Commission’s (“Commission”) Notice of Proposed Rulemaking that put out for comment the Federal-State Joint Board on Universal Service’s Recommendations on adding new services to the established list of “core” services supported by the federal universal service fund (“USF”).¹

I. INTRODUCTION

The vast majority of commenters in this proceeding oppose the addition of equal access to the list of services supported by the USF. Not only CMRS carriers, but also state regulatory commissions, Bell Operating Companies and interexchange carriers see the distortions and lack of public benefit that would flow from requiring CMRS carriers to provide interexchange “equal access.” Only the rural incumbent local exchange carriers (“ILECs”) transparently seek to erect barriers to entry by pressing equal access upon carriers whose operations, for good reason, do not support it. While the rural ILECs vigorously support imposing an equal access requirement on CMRS carriers, they offer no legal or policy justification for such a requirement. The

¹ See Federal-State Joint Board on Universal Service, *Notice of Proposed Rulemaking*, CC Docket No. 96-45 (rel. Feb. 25, 2003); See Federal-State Joint Board on Universal Service, *Joint Board Recommended Decision*, 17 FCC Rcd 14095 (rel. July 10, 2002).

Commission cannot impose an arbitrary, costly and inherently pointless requirement on CMRS carriers without identifying any legally sustainable reason for doing so.

No commenter has demonstrated how the Commission can overcome the statutory prohibition on any requirement, however indirect, requiring CMRS carriers to offer interexchange equal access. Section 332(c)(8) of the Act specifically provides that CMRS carriers “shall not be required to provide equal access to common carriers for the provision of telephone toll services.”² As Nextel demonstrated in its initial comments, there are no exceptions to this very unambiguous statute.³ Section 332(c)(8) explicitly denies the Commission authority to impose an equal access obligation on wireless carriers either as a condition for ETC status or otherwise. The Commission cannot ignore the law and alter the definition of core supported universal service to impose indirectly a *statutorily* prohibited landline regulation on CMRS carriers.

A limited subset of commenters also urged the Commission to include advanced services in the list of USF supported services. As part of the Rural Task Force arrangement, the Commission already allows rural incumbent Eligible Telecommunications Carriers (“ETCs”) to use universal service funds to rebuild their networks into broadband networks capable of providing advanced services. Adding advanced service to the list of services explicitly supported by the USF would only ensure that the USF grows beyond any sustainable level.

Fortunately, there seems to be broad agreement that rural America has benefited greatly from the availability of competitive wireless services. Availability of ETC funding can make an enormous difference in a wireless carrier’s ability to serve effectively rural communities.

² 47 U.S.C. § 332(c)(8).

³ Nextel Comments at 7-8.

Notwithstanding the legal barriers to imposing equal access on CMRS carriers, even conditionally, the focus of the interexchange equal access debate has to be on whether it could materially advance or benefit the public living in rural areas. The record on this point is obvious. USF eligibility rules should never be used as a backhanded way to protect the “home turf” of rural ILECs.

II. THERE IS NO RECORD TO EXPAND EQUAL ACCESS REQUIREMENTS.

While there is no mainstream support for expanding the list of USF supported services, at least one ILEC trade association, the United States Telecom Association (“USTA”), apparently perceived an opportunity to gain equal access relief for its members. USTA offers the Commission a false choice of either imposing an equal access requirement on CMRS carriers or unilaterally abandoning it for all local exchange carriers (“LECs”).⁴ The focus of this proceeding, however, is not whether LECs should be subject to equal access, but whether CMRS carriers should be. Thus, the Commission need not reexamine LEC equal access obligations generally in this proceeding.

A critical point in the policy deliberations on the equal access issue is whether telecommunications services that can function as equivalents on some level must be made by regulation to look, act and feel the same. This cannot be the government’s answer to the non-problem of CMRS equal access. ILECs and CMRS carriers have vastly different operating characteristics – including different billing systems, different elasticity of demand for their services and entirely different network infrastructure. From both a legal and a policy standpoint, different regulatory treatment is often warranted. The fact remains that LECs are obligated statutorily to provide equal access, while Congress expressly excluded CMRS from that

⁴ See Comments of the United States Telecom Association at 6.

requirement.⁵ No commenter has demonstrated how the Commission can overcome the statutory prohibition nor demonstrated that doing so is necessary to advance the public interest.⁶

Certain rural commenters accused wireless ETCs of using alleged “windfalls” of USF support to compete unfairly against rural ILECs but offered no examples to support this hollow accusation.⁷ Others merely argued that equal access is necessary because wireless ETCs are taking too much from the USF.⁸ While ignoring the inherent differences between wireline and wireless service, these rural ILEC commenters mostly rely on principles of “regulatory parity” and “competitive neutrality” as the primary reasons for requiring equal access; they ignore the statutory prohibition on applying equal access requirements to CMRS carriers.⁹ As Nextel and Nextel Partners explained in their comments, the wireline industry has traditionally been fragmented on the basis of local exchange and toll boundaries. The Bell System divestiture court agreed that an interexchange equal access requirement would promote interexchange

⁵ Section 332(c)(8) of the Communications Act of 1934, as amended, forbids any requirement on CMRS carriers to offer interexchange carriers access to CMRS networks to provide “toll telephone service.” 47 U.S.C. § 332(c)(8). Section 251(g) states that local exchange carriers shall comply with equal access requirements in effect prior to the enactment of the Telecommunications Act of 1996 until such requirements are removed by the Commission. 47 U.S.C. § 251(g).

⁶ Certainly none demonstrated that equal access passes the statutory thresholds to be considered a core supported service. *See* Comments of The Organization for the Promotion and Advancement of Small Telecommunications Companies at 2; *See* Comments of Montana Universal Service Task Force at 10; *See* Comments of National Telecommunications Cooperative Association at 2.

⁷ *See* Comments of the National Telecommunications Cooperative Association at 6.

⁸ *See* Comments of The Organization for the Promotion and Advancement of Small Telecommunications Companies at 14-15.

⁹ *See id.*; *See* Comments of Montana Universal Service Task Force at 10-11.

competition.¹⁰ No such considerations exist in the wireless world and the Commission must ultimately be guided by the fact that Congress has mandated that CMRS is not to be subject, even conditionally, to full blown requirements on the provision of equal access.

III. COMPETITIVE ETCs ARE NOT RESPONSIBLE FOR GROWTH IN THE USF.

No commenter herein identified any legal basis to add equal access to the definition of USF supported services. The lack of any identifiable legal basis, however, is apparently not enough to prevent rural ILECs from making unsubstantiated assertions about the harm that is occurring in rural areas because wireless carriers do not provide equal access. While these assertions truly are besides the point, as the Commission has no authority to impose equal access as an ETC condition, Nextel responds to the rural ILECs policy arguments to underscore the tremendous foresight and success of Congressional deregulatory policy in this area.

It is undisputed that CMRS carriers have substantially increased telecommunications options in rural and high-cost areas and, given the appropriate regulatory environment, could continue to deliver new and affordable service to high-cost areas. Earlier this year, the Commission initiated a proceeding to enhance the effectiveness of its current regulatory tools in facilitating the delivery of spectrum-based services to rural areas and sought comment on whether and how it could modify its policies to promote the further development and deployment of wireless services to rural areas.¹¹ In the context of this proceeding, rural ILECs extolled the

¹⁰ Comments of Nextel Communications, Inc. and Nextel Partners, Inc. at 4. Thus, it is specious to argue that CMRS carriers exert “monopoly-like control over their customers’ access to IXCs.” See Comments of the Nebraska Rural Independent Companies at 9.

¹¹ See Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services, *Notice of Inquiry*, 17 FCC Rcd 25554 (2003).

virtues of wireless service but appeared to believe that only rural telephone companies were qualified to offer these services in rural areas.¹²

In this proceeding some rural ILECs inexplicably argue that CMRS rate structures are “anti-consumer,” “unaffordable” and “not comparable with those offered in rural areas.”¹³ The facts, of course, do not support such assertions. In the Commission’s Seventh CMRS Competition Report, it cited a study that found that “there was virtually no difference” in average monthly wireless charges in urban and rural markets.¹⁴ In fact, CMRS “flat rate” plans are one of the most popular features of wireless service and a primary reason why consumers choose to subscribe.¹⁵ There is no reason to believe that rural customers do not find one rate pricing plans as attractive as urban customers do.¹⁶ Rural ILECs cannot have it both ways. If there is broad

¹² See Comments of The National Telecommunications Cooperative Association, WT Docket No. 02-381 (filed Feb. 3, 2002) at 3 (arguing that rural telephone companies are uniquely situated to provide wireless service in rural areas because they are motivated by a “civic duty” to ensure the viability for their respective communities); See Comments of the National Rural Telecommunications Cooperative, WT Docket No. 02-381 (filed Feb. 3, 2002) (arguing that “local community ties” are an invaluable tool in deploying wireless services in rural areas).

¹³ See Comments of Fred Williamson and Associates, Inc. at 13.

¹⁴ See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Seventh Report*, 17 FCC Rcd 12985 at 38 (2002) hereinafter (“*CMRS Competition Report*”). The average monthly charge for the top 25 markets was \$37.39, while the charge for rural markets were slightly less at \$36.34, a difference of only 2.9%. *Id.*

¹⁵ Press Release, J.D Power and Associates, J.D. Power and Associates Reports: Wireless Usage Continues to Climb as Flat Rate Pricing and Free Minutes Become More Prevalent in the Marketplace (Sept. 30, 2000). Flat rate plans that vary by usage levels and contain free/discounted off-peak calling minutes continue to be popular among wireless users. More than 60% of wireless users say they receive such discounted or free minutes and more than 33% say this incentive has led them to use their wireless service more often. *Id.*

¹⁶ The Commission has properly concluded that the continued rollout of differentiated pricing plans indicates a competitive marketplace. See *CMRS Competition Report* at 29.

agreement that increased wireless services are good for rural America, then the Commission ought to be encouraging the deployment of these services, not impeding it with unnecessary equal access requirements.

Rural ILECs currently receive the overwhelmingly largest portion of the high-cost fund.¹⁷ Several of these rural ILECs have been increasing the amounts they receive from the USF exponentially. The fact of the matter is that the tremendous growth in the USF is not due to the presence of wireless ETCs, but rather due to the increasing amounts that rural carriers take out of the fund.¹⁸

IV. CONCLUSION

The rural ILECs are the only group supporting expansion of USF to include an equal access requirement. Their comments utterly fail, however, to demonstrate any basis whatsoever on which the Commission might proceed to impose such a requirement as Congress has foreclosed by statute the imposition of an equal access regulatory construct for CMRS service providers. The rural ILECs offer no justification or rationale for such a policy, other than it would make every carrier in rural markets look, act and feel the same. A drastic, arbitrary and costly regulatory requirement requires a far better legal and policy defense.

¹⁷ In 2002, local exchange carriers received nearly \$3 billion in universal service high-cost support while CMRS carriers received only \$44 million. *See* Universal Service Administrative Company 2002 Annual Report to the Federal Communications Commission at 25.

¹⁸ The amount that several rural ILECs receive has dramatically increased since 1999. For example, in 1999 Tularosa Basin Telephone Company only received approximately \$148,704 in high-cost support and in 2002 they reportedly collected \$984,492, an increase of over 500%. Similarly, Elsie Communications, Inc. received no high-cost support in 1999 and received approximately \$399,750 in support in 2002, over a 1000% increase. *See* Quarterly Administrative Filings of the Universal Service Administrative Company to the Federal Communications Commission <http://www.universalservice.org/overview/filings/> (last visited April 10, 2003).

One of the most important goals of the USF is to ensure that rural consumers get to choose from the same variety of telecommunications options available to urban consumers. While everyone agrees that this should include wireless services, rural ILECs want to saddle new wireless entrants with an impossible regulatory requirement that would adversely affect wireless innovation, the engine of growth in telecommunications today. A CMRS equal access requirement would decrease the service choices of rural consumers, a result that directly contradicts the idea of promoting universal service.

Respectfully submitted,

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